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United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Edward H. Phelan,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

There is apparently but one question of fact involved in this case, i. e., the age of plaintiff in error on June 5, 1917. Was he within the prescribed draft age? That he did not register is conceded by plaintiff in error. [Tr. p. 77.] The question of whether or not he was exempt from registration by virtue of any enlistment in any branch of the military establishment was not raised by plaintiff in error. Had the question been raised, it would be eliminated by the testimony of the

plaintiff in error who admitted his only reason for not registering was that he thought he was not within the age [Tr. p. 77]:

"Had I believed that I was not thirty-one years of age, I certainly would have registered."

The allegation in the indictment that he was not an officer or enlisted man in any branch of the military establishment of the United States [Tr. p. 7], is a negative allegation and not subject to affirmative proof. The fact that he was such would have been a defense which was not raised at the trial.

The Government contended that the plaintiff in error was thirty years old on June 5, 1917, and, therefore, subject to the draft, and in proof thereof submitted the fact and circumstances of his baptism, the testimony of a life-long neighbor and the direct statement of the plaintiff in error that he was born July 13, 1886 [Tr. p. 47], made at a time—1909—in writing when there was no question of war or draft and on a solemn occasion when he applied for membership in the Order of the Knights of Columbus.

The Government also introduced the testimony of two witnesses to the effect that the plaintiff in error declared his intention to leave the state for the express purpose of evading the draft.

Plaintiff in error then testified that he was born March 13, 1886, but that he had always considered and believed it to be July 13, 1886, until four years ago when his mother told him he was mistaken. [Tr. p. 77.] Mary Phelan testified that plaintiff in error was born March 13, 1886, that this had always been her

belief and she had at no other time thought differently or made any statement of a contrary nature. [Tr. pp. 86 and 87.]

Mary Phelan's testimony was refuted first by United States Exhibit No. 2, which is a petition for an order to set apart a homestead signed and executed by her February 9, 1892 [Tr. pp. 88-94], which set out the statement of her deceased husband that on June 4, 1886, there were five children in existence which did not include plaintiff in error, as he was not then in existence. Mary Phelan said that her husband was mistaken. [Tr. p. 88.] In the second place, in said Exhibit [Tr. p. 93], she made the statement that at the time of her husband's death the plaintiff in error was about two years old. Thomas Phelan, the husband and father, died June 1, 1889. [Tr. p. 89.] If plaintiff in error was born March 13, 1886, he would have been, on June 1, 1889, over three (3) years old.

Mary Phelan's testimony was further impeached. United States Exhibits Nos. 3 and 4, which contained five separate statements by her, made at different times, that the plaintiff in error was born July 13, 1886.

Mrs. Martinez, who, the plaintiff in error alleged, was present at his birth, stated that her son, Gaspar, "is *about* a year and two months older than Edward." [Tr. p. 121.]

The best answer to this is the witness' own testimony [Tr. p. 121] that the source of her knowledge as to her own boy's birthday was given to her by him after she had been subpoenaed in this case. She did not testify as to the time of birth of plaintiff in error.

I.

Plaintiff in error first argues in his brief (p. 54) with reference to specifications of error numbered I, II, III, IV and V. Defendant in error will answer the general questions raised in this group of specifications to conform with the manner of argument adopted by the plaintiff in error.

First of all, the question is raised as to whether or not the witness Father Harnett could testify as to date of birth and whether the baptismal record reciting the date of birth could be introduced for that purpose. The baptismal record was offered for that purpose, and upon objection of plaintiff in error was rejected by the court, and that question is therefore not before this court.

Father Harnett, who officiated at the baptism of the plaintiff in error [Tr. p. 37], testified orally, after refreshing his memory from the record he made in the registry [Tr. p. 35], as to the date of baptism [Tr. p. 37]:

"* * * I bapitzed the child, and after referring to the record can state the date of the baptism.

The Court: All right. I think his testimony as to the date of baptism would be better than the record.

Mr. Dockweiler: Yes, Your Honor, if it is competent.

Q. By the Court: Now, what date was the child baptized?

* * * * * * * * *

A. I baptized the child on the 8th of August, 1886."

The fact and date of baptism are not immaterial, as plaintiff in his brief on page 55 alleges. The best answer to that is if plaintiff in error was baptized before June 5, 1886, it would be substantial evidence of his existence before that date, a fact which would have precluded him from the duty of registering on June 5, 1917.

Whitcher v. McLaughlin, 115 Mass. 167,

goes even further than the trial court in the case at bar.

Defendants offered in evidence the baptismal records of St. Patrick's parish, in the city of Boston, in which was inserted the following entry: "1852, October 3, James, born the 2d instant, son of Lawrence McLaughlin and Ann, his wife; sponsors John and Ann Tobin, signed Thomas Lynch." Priest testified that baptism is a sacrament in the Catholic church and that the priest is required by the canons of the church to record all baptisms; that no particular rule fixes the time within which infants of confirmed Catholics shall be baptized, but it is generally supposed that children will be baptized within 9 or 11 days under pain of sin. The issue was the age of the defendant. Plaintiff contended that the record was not admissible. Held that the record was admissible and competent to prove age when connected with other evidence.

The balance of the argument of plaintiff in error in regard to the above specifications of error is based upon the following false premises and assumption in brief of plaintiff in error, pages 56-62:

1. Baptismal record was admitted in evidence.

2. That baptismal record was admitted to prove date of birth.

3. That it is assumed defendant in error relies upon pedigree for the admission of such evidence.

It has already been pointed out that oral evidence was adduced by the officiating priest as to the fact and date of baptism—no record was introduced, although defendant in error is convinced that such a record for that purpose would be admissible—and that no question of hearsay is involved, which precludes any discussion as to pedigree which is an exception to the hearsay rule.

As to the doctrine of the Catholic Church with reference to the salvation of infants who die without baptism [Tr. p. 39], it is merely one circumstantial fact. It was also shown that the parents of the plaintiff in error belonged to the Roman Catholic Church. [Tr. p. 38.] That age may be circumstantially proved needs no elaboration.

Whitcher v. McLaughlin, 115 Mass. 167, quoted above.

II.

Plaintiff in error next argues, in regard to specifications of errors VI, VII and VIII, that photostat copies of affidavits and pension applications made by Mary Phelan were erroneously admitted in evidence.

The witness Mary Phelan had testified that the plaintiff in error was born on March 13, 1886, and, continuing, stated [Tr. pp. 86 and 87]:

"I have always been under that impression and always will be, and have never acted any differently or

said differently. I have always held him out as having been born March 13th, 1886. I never gave any other date. I always gave March 13, 1886. Nobody ever asked me anything about it. I did not tell anybody because nobody asked me. I never had any occasion to tell his birthday.

Q. Whenever you had occasion to?

A. I never had any occasion.

Q. Never had any occasion?

A. No, sir; never.

* * * * * * * * *

Q. You say that four years ago was the first time that you ever had occasion to give the birthday of Edward to anybody else; is that right?

* * * * * * * * *

A. Yes, sir.

Q. That is the first time?

A. That is the first time. I never told anybody what his birthday was before that time. I never was asked and I never told anybody else and never made a statement. I am positive of that."

The same witness further testified [Tr. p. 95]:

"I am now drawing a pension from the Government. I don't remember where I made the application. I have been working at it ever since my husband died. I have made several applications, but I don't remember how many. I tried it a long time and then I stopped for two or three years. I couldn't get it, and then the man back in Washington wrote to me. I don't remember when I finally got it. I couldn't say whether it was eight years ago or not. I don't remember when I first

made the application. I don't remember when I made it. I have made several applications."

Thereupon, Government Exhibits Nos. 3 and 4 were shown to the witness. [Tr. pp. 95 and 96.] Exhibit No. 3 is a deposition made, signed and sworn to by Mary Phelan [Tr. p. 101] before a special examiner of the Bureau of Pensions [Tr. p. 98], on the 10th day of November, 1909. Among other things therein set out is the statement that the plaintiff in error was born July 13, 1886, and that said record was in her family Bible [Tr. p. 100], and also the statement that she had made several applications for pension. She did not know how many and that the applications which were shown to her at that time were dated October 12, 1889, May 12, 1908, and August 15, 1890, and bore her signature and were executed by her. [Tr. pp. 98 and 99.]

United States Exhibit No. 4 [Tr. pp. 103-113] consists of three applications for pension dated October 12, 1889, August 15, 1890 and May 12, 1908, respectively. In each and every one of these applications, the birthday of the plaintiff in error is given as July 13, 1886 [Tr. pp. 105, 107 and 110.] This exhibit also contains a proof of a birth dated October 3, 1892, wherein the birthday of plainiff in error is likewise set out as July 13, 1886. The above documents all signed and executed by Mary Phelan.

Defendant in error calls the attention of the court to the identity of the dates of the applications referred to in United States Exhibit 3 and the applications in

United States Exhibit 4. To the introduction of these exhibits the plaintiff in error objects on the grounds that they are incompetent, irrelevant and immaterial, and that no proper foundation had been laid. [Tr. pp. 97 and 102.] The relevancy and materiality of this evidence is manifest. Its competency is equally apparent. (See Fed. Stat. Annot., Vol. 3, Sec. 882, p. 26):

"(Copies of department records and papers.) Copies of any books, records, papers, or documents in any of the executive departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof."

Act of Aug. 24, 1912, 37 Stat. at Large, p. 498; also Fed. Stat. Ann. Supplement 1914, p. 175, sections 1 in part and 3 and 4:

Sec. 1. "(Copies of records to be furnished—schedule of fees—verification—no charge for official use—authenticated copies of printed rules, etc.) That the Secretary of the Interior, the head of any bureau, office, or institution, or any officer of that department, may, when not prejudicial to the interests of the Government, furnish authenticated or unauthenticated copies of any official books, records, papers, documents, plats, or diagrams within his custody, and charge therefor the following fees:"

Sec. 3. "(Acceptance as evidence.) That all authenticated copies furnished under this act shall be admitted in evidence equally with the originals thereof."

Sec. 4. "(Use of seal.) That all officers who furnish authenticated copies under this act shall attest their authentication by the use of an official seal, which is hereby authorized for that purpose."

Plaintiff in error first argues that no proper foundation was laid. (Brief of Plaintiff in Error pp. 65-70.)

Mary Phelan testified as follows [Brief of Plaintiff in Error p. 95; Tr. p. 96]:

"The Court: Let it be marked Exhibit 3.

(The document so offered and identified was thereupon marked 'United States Exhibit No. 3').

Q. By Mr. Lawson: Isn't this your signature? (Exhibiting document to witness.)

A. I will have to say as I did to the other one, it looks like my signature, but I can't remember signing it.

Q. It looks like your signature?

A. Yes, sir."

The witness' reference "to the other one" was United States Exhibit No. 2, the only other document that had been submitted to her up to that time. She testified regarding her signature to that document as follows [Tr. p. 88]:

"That looks like my signature on the document you handed me. It is not like I write now. It looks like it at that time. * * * That looks like my signature; it looks like it. They did not read it to me, and I did not know what was in it. Whoever wrote it did not know anything about it. That is my statement and my signature."

The witness, therefore, did testify that the signature to United States Exhibit No. 3 appeared to be her signature at the time of making it, though not like her present signature. No one was better qualified to testify than this witness.

The utter futility of asking this witness whether or not she had made the statements contained in United States Exhibit No. 3 as a necessary step to lay a foundation for its introduction as evidence is patent from her testimony on page 88, above referred to. Not only would it have been futile, but the proper procedure was to submit the document to the witness and ask her whether or not it was her writing.

Greenleaf on Evidence, Sec. 465:

"A witness cannot be asked on cross-examination whether he has written such a thing, stating its particular nature or purport; the proper course being to put the writing into his hands and ask him whether it is his writing."

Also

Jones on Evidence, Sec. 847:

"Contradictory written statements—mode of procedure.—Witnesses may be impeached by producing their written statements, for example, their letters, affidavits, depositions or the like, which are inconsistent with the testimony given at the trial. Thus, where the witness testified that the plaintiff had been discharged from service for neglect of duty, a letter of the witness stating that the plaintiff had performed efficient service was held admissible. But the witness cannot, in the

first instance, be asked as to the contents of what he has thus written, since this would be a violation of the familiar rule as to best evidence. This is the rule maintained in nearly all jurisdictions in this country and in many states is declared by statute. If the question is asked whether the witness had made certain representations, his counsel has the right to ascertain whether the representations or statement was written or oral, and, if it appears to have been in writing, the paper should be produced before he is compelled to answer."

The statement of witness that she was now drawing a pension and that she had made several applications for the same at intervals, together with the identification of her signature, is sufficient proof of the execution of United States Exhibit No. 3, which exhibit is proof of the execution of United States Exhibit No. 4 [Tr. pp. 98 and 99]:

"I made several applications for pensions. I do not know how many. The applications now shown me, dated October 12th, 1889, May 12th, 1908, and August 15th, 1890, bear my signatures and were executed by me before the several officers named therein, and the witnesses named were present at the several dates of execution thereof."

Moreover, the witness Mary Phelan testified in the same way as to her signature to United States Exhibit No. 4. [Tr. pp. 96 and 97.]

It should also be borne in mind that United States Exhibit No. 2 was then in evidence and bore the ad-

mitted signature of Mary Phelan [Tr. p. 88], and the jury, therefore, had the right to compare that signature with the signature on United States Exhibits Nos. 3 and 4.

The argument of plaintiff in error (in his brief) on this point, that no proper foundation was laid for the introduction of Government's Exhibits 3 and 4, is further predicated on the theory that these documents are secondary evidence. (Brief of Plaintiff in Error, p. 66.) These documents are specifically designated as primary evidence. To consider these documents as secondary evidence would defeat the very purpose of the statutes.

Sec. 882, Fed. Statutes Ann., Vol. 3, p. 26, quoted above;

37 Stat at Large, Vol. I, Chap. 370, p. 497; quoted above;

Fed. Stat. Ann. Supplement 1914, p. 175.

Cases cited by plaintiff in error are not in point. Those cases turned upon the admissibility of copies of original documents and did not involve the admissibility of copies of public documents for documents in the custody of the Government. There was also not involved a statute that gives the right to admit copies of documents, papers, etcetera, on file with the Government equally with the originals thereof.

Fed. Statutes Ann. Supp. 1914, p. 175, Sec. 4; quoted above.

That United States Exhibits 3 and 4 are included in the statutes there can be no question. (Statutes above cited.)

It is next argued by plaintiff in error in his brief (p. 171) that the documents (referring to United States Exhibits 3 and 4) were not produced from the proper custody, basing his chief reliance upon the fact that he knew of "no statute or other authority empowering the chief investigator of the Department of Justice to have the custody and control over any documents, papers, or records of the Pension Bureau which rightfully belong in the custody of the Department of the Interior."

The documents themselves in the certificate and seal thereof are the best evidence of source from which they issued. Plaintiff in error again makes the mistake of hypothecating his conclusion on the false presumption that these documents are secondary evidence.

Under the discussion of this point, plaintiff in error again raises various objections to the end that no proper foundation was laid for the introduction of United States Exhibits 3 and 4. (Brief of Plaintiff in Error pp. 71 and 72.)

"(a) The certificate attached to the copies introduced in evidence was not made by the proper officer." Fed. Stat. Ann. Supp. 1914, Sec. 1, gives "a head of a bureau" the specific authority.

The documents in question were made and authenticated by the Commissioner of Pensions, the head of the Pension Bureau.

"(b) The certificate was not made in proper form. A general objection which merits no reply.

"(c) The certificate was not made under seal."

By order of the trial court, these documents have been forwarded for the inspection of the United States District Court of Appeals in answer to this objection.

(d) "The exhibits in question were not such records copies of which the statute contemplates may be introduced in evidence" (p. 72).

In addition to Sec. 882, Vol. 3, Fed. Stat. Ann., p. 26, quoted by plaintiff in error in his brief (p. 72), the following is herewith submitted:

Fed. Stat. Ann. Supp. 1914, p. 175:

Sec. 1. "That the Secretary of the Interior, *the head of any bureau,* office, or institution, or any officer of that department, may, when not prejudicial to the interests of the Government, furnish authenticated or unauthenticated copies of *any official books, records, papers, documents, maps, plats, or diagrams within his custody,* * * *"

Sec. 3. "That all authenticated copies furnished under this act shall be admitted in evidence equally with the originals thereof."

Sec. 4. "That *all officers* who furnish authenticated copies under this act *shall attest* their authentication *by the use of an official seal which is hereby authorized for that purpose.*"

By Sec. 1 in above act, the documents or papers in question which were in the Bureau of Pensions were obviously contemplated and included, and the head of that bureau mentioned in said section was manifestly

given the power to authenticate and attest them by an official seal. (Sec. 4 of said Act.)

The formalities were all observed and the documents themselves attest this. The argument of plaintiff in error in his brief (p. 72) that the seal was not in the required form appears somewhat captious.

Ballew v. U. S., 160 U. S. 187:

"During the trial of Ballew in connection with a fraud perpetrated by him in withholding part of pension from a pensioner of the United States, a page from the records of the pension office was introduced and admitted in evidence over objection of counsel for accused, which admission was assigned as error to this court. HELD: Objection was that certificate was improperly authenticated because signed by acting Secretary of the Interior under seal of department, and referred only to official character of Commissioners of Pensions and the faith and credit to which his attestations were entitled, citing Rev. Stat., Sec. 882. Copy was proceeded with certificate signed by Commissioner of Pensions, certifying that the copy was a true copy of the original; the pension office was but a part of the Department of the Interior, and the certificates, taken together, were a substantial compliance with the statute."

In reply to the argument of plaintiff in error, on page 76 of brief of plaintiff in error, to the effect that no evidence was laid for the impeachment of Mary Phelan has been above answered and it is again pointed out that in the cross-examination of Mary Phelan in

regard to whatever former statements that she may have made in regard to the birth or age of the plaintiff in error, the latter did not demand to know whether those statements referred to were in writing.

III.

Specifications numbered XV, XVI, XVII, next discussed by plaintiff in error in his brief (pp. 77-70), relate to correspondence between the United States Attorney and the Department of Justice and the Bureau of Pensions with reference to the efforts of the United States Attorney to secure the originals of the photostat copies contained in United States Exhibits Nos. 3 and 4.

As previously discussed, there is no question of secondary evidence involved and such evidence was unnecessary to lay a foundation. The documents, United States Exhibits Nos. 3 and 4, are made primary evidence by statute. Even though such evidence were required, the Exhibits 5 and 6 speak for themselves, quoted by plaintiff in error in his brief on pages 77 and 79 and transcript pages 116-118, to the end that the United States Attorney endeavored to get the originals and the photostat copies were sent instead with the opinion from Washington that such would answer the purpose equally as well as the originals, which, according to the statutes above referred to, the defendant in error thinks is sound.

Specification XVIII (brief of plaintiff in error, pp. 80-82) refers to the introduction of United States Exhibit No. 1. Plaintiff in error admitted signing the

document [Tr. p. 46], which is ample proof of its execution.

Specifications of error XI, XII, XIII, XIV deal with subjects that the court refused to allow plaintiff in error to inquire into (brief of plaintiff in error, pp. 82-86). The discussion of plaintiff in error himself reveals the collateral nature of the facts he sought to solicit.

The other specifications of error are not of sufficient importance to discuss. Plaintiff in error, however, comments upon remarks made by counsel for the Government to the jury [Tr. pp. 127 and 128].

Counsel for plaintiff in error invited counsel for defendant in error to go outside of the record [Tr. p. 127]. Mr. Dockweiler stated to the jury:

"The first witness called by the prosecution was a gentleman by the name of George T. Jeffries, deputy county recorder. He testified to nothing that is before you."

Defendant in error had the right to correct the impression left by such a remark. Even though this be not so, the jury were instructed by the court as follows [Tr. p. 128]:

"The jury will not consider the remarks of the United States Attorney, coming to a conclusion from this evidence. The jury have no right to consider any evidence that was excluded."

This cured the error, if any was made. In any event, the record discloses no willful abuse of privileges and rights accorded to counsel. Clearly no persistent

abuse indicating animus in the mind of counsel, or impressions left that were likely to create prejudice in the minds of the jurors.

Chadwick v. U. S., 141 Fed. 225;
Diminick v. U. S., 135 Fed. 257-121 Fed. 638;
Carlisle v. U. S., 194 Fed. 827;
Ammerman v. U. S., 185 Fed. 1-710;
Woods v. U. S., 174 Fed. 651;
Richards v. U. S., 175 Fed. 911;
Carroll v. U. S., 154 Fed. 425;
U. S. v. Snyder, 14 Fed. 554;
Dunlap v. U. S., 165 U. S. 486.

We respectfully submit that no errors prejudicial to the rights of the plaintiff in error have been committed, and, therefore, that the judgment of the District Court be affirmed.

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